



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 5075-02
2 October 2002

[REDACTED] SMC
[REDACTED]

Dear Gunnery [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

It is noted that the Commandant of the Marine Corps (CMC) has amended the contested fitness report for 29 June to 13 August 2001 by removing all references to events that happened after the period concerned.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 26 September 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB), dated 3 June 2002, and the advisory opinion from the HQMC Military Law Branch, Judge Advocate Division (JAM7), dated 6 August 2002 with enclosure, copies of which are attached. Finally, they considered the command file on the contested nonjudicial punishment of 13 August 2001.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the report of the PERB and the advisory opinion from JAM7. Specifically concerning the contested fitness report, they found this report accurately stated your primary duty as "NCOIC [noncommissioned officer in charge]," although you were suspended from this duty for the latter portion of the reporting period. They were unable to find you were not informed of what duties you were expected to perform after this suspension. Concerning your objection that you were not formally counseled in writing about harassing telephone calls, they found that your command properly dealt with this matter by taking disciplinary

action against you. In view of the above, your application for relief beyond that effected by CMC has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:

The Honorable Elijah J. Cummings ·
The Honorable Mary L. Landrieu



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

5075-02

IN REPLY REFER TO:
1610
MMER/PERB
JUN 03 2002

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
GUNNERY SERGEANT [REDACTED] USMC

Ref: (a) GySgt [REDACTED] DD Form 149 of 11 Mar 02
(b) MCO P1610.7E w/Ch 1-2

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 29 May 2002 to consider Gunnery Sergeant [REDACTED] petition contained in reference (a). Removal of the fitness report for the period 000629 to 010813 (DC) was requested. Reference (b) is the performance evaluation directive governing submission of the report.

2. The petitioner contends the reporting period does not coincide with his billet description and believes the report is fraught with other administrative errors. In support of his appeal, the petitioner furnishes his own statements, a copy of the challenged fitness report, a copy of the Punitive Letter of Reprimand, and letters from Gunnery Sergeant [REDACTED] Staff Sergeant [REDACTED] and Sergeant [REDACTED].

3. In its proceedings, the PERB concluded that, with minor administrative errors, the report is procedurally complete as written and filed. The following is offered as relevant:

a. In the petitioner's statement included with reference (a), wherein he challenges the fitness report, he has done nothing more than restate what he provided in his official rebuttal. At the time the report was adjudicated, both the Reviewing and Third Sighting Officers thoroughly resolved the petitioner's concerns, albeit not in his favor. The petitioner's commentary and the advocacy letters provided with reference (a) notwithstanding, the Board finds nothing to prove that the report is either in error or unjust. Succinctly stated, the petitioner made significant errors in judgment and was correctly held accountable, all of which has been correctly reported via the performance evaluation system.

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
 ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
 GUNNERY SERGEANT [REDACTED] USMC

b. The Board observes that issues occurring subsequent to the end of the reporting period were incorrectly included in the fitness report. They do not, however, find that complete removal of the report is either necessary or warranted. Instead, the Board has directed that the verbiage identified below be eliminated from the fitness report at issue:

(1) From Section I: "Appeal was denied by the CG, MCRD/ERR on 20010917. [REDACTED] received a punitive letter of reprimand from District Commanding Officer on 17 September 2001."

(2) From paragraph six on the Addendum Page (MRO Statement, Page 3 of 3) signed by subject on 20011116: "The Fitness Report also stated I received my Letter of Reprimand from the District Commanding Officer on 17 September 2001. I never received it until 8 October 2001 when I signed it."

(3) From paragraph five on the Addendum page (RO Statement) signed by Colonel [REDACTED] on 20011126: "MRO appealed the NJP to the CG, MCRD/ERR, Parris Island and the appeal was denied on 20010917."

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness report, as modified, should remain a part of Gunnery Sergeant [REDACTED] official military record. The corrections identified in subparagraphs 3b(1), 3b(2), and 3b(3) are considered sufficient.

5. The case is forwarded for final action.

[REDACTED]
 [REDACTED] DAYMAN
 Chairperson, Performance
 Evaluation Review Board
 Personnel Management Division
 Manpower and Reserve Affairs
 Department
 By direction of the Commandant
 of the Marine Corps



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO
1070
JAM7
06 AUG 2002

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
ICO GUNNERY SERGEANT [REDACTED]

Encl: (1) Pre-Trial Agreement

1. We are asked to provide an opinion on Petitioner's request for the removal from his service record book (SRB) and official military personnel file (OMPF) of all entries related to the non-judicial punishment (NJP) he received on 13 August 2001.

2. We recommend that Petitioner's request for relief be denied. Our analysis follows.

3. Background

a. On 13 August 2001, Petitioner, a gunnery sergeant (GySgt), received NJP for false official statement, sodomy, adultery, indecent exposure, and indecent language, in violation of Articles 107, 125, 128, and 134 of the Uniform Code of Military Justice (UCMJ). Petitioner was awarded a forfeiture of \$1,333.00 pay per month for 2 months and a letter of censure.

b. On 16 August 2001, Petitioner appealed his NJP on the grounds that the punishment imposed was illegal arguing the evidence did not amount to a preponderance of the evidence. On 17 September 2001, the Commanding General, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, South Carolina, denied Petitioner's appeal.

4. Analysis. No legal error occurred in the imposition of Petitioner's NJP. Petitioner, however, claims that his NJP was unjust because the commanding officer committed procedural error by imposing punishment based upon evidence not amounting to a preponderance of the evidence. Petitioner further asserts that he was not provided his rights notification, therefore he did not know he could call witnesses on his behalf. Petitioner also asserts that he was denied the right to hear the testimony of the victims since the commanding officer accepted written statements. Petitioner's claims are without merit. Each claim is addressed separately below.

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ICO GUNNERY SERGEAN [REDACTED] USMC

a. Insufficient Evidence. Petitioner's claim that the commanding officer committed procedural error by imposing NJP with insufficient evidence is without merit. Non-judicial punishment is an administrative proceeding, not a criminal trial. Therefore, the formal rules of evidence do not apply. Moreover, the standard of proof at NJP is "by a preponderance of the evidence" rather than "beyond a reasonable doubt." Petitioner's application to BCNR indicates that the alleged victims provided the command with written statements describing the incident. In addition, Petitioner's application describes this incident as a case of "he said, she said." While it is not possible to determine exactly what evidence persuaded Petitioner's commanding officer of his guilt, that officer could properly choose to believe the alleged victim's statement over the accuser's denials.

b. Rights notification. Based on the documentary evidence provided by Petitioner, the NJP proceeding was conducted properly and Petitioner received all the rights to which he was entitled at NJP. Petitioner was advised of his right to counsel on 13 August 2001 and talked to a military lawyer on the same day. Similarly, Petitioner was informed of his right to demand trial by court-martial but instead elected to accept NJP. Additionally, Petitioner signed a Pre-Trial Agreement (enclosure 1), which states, "that for good consideration and after consultation with my counsel, both military and civilian. I do agree to accept Commanding Officer NJP, to the charges and specifications." The Petitioner also states that, "I have been counseled by my detailed defense counsel and my civilian defense counsel, concerning my rights and the possible punishments at NJP." If Petitioner truly believed he was not guilty then he should not have accepted NJP and instead forced the Government to prove his guilt at a court-martial. Further indicia of Petitioner understanding his rights at NJP is the fact Petitioner also elected to have a [REDACTED] as a witness at his NJP, and [REDACTED] was in fact present at his NJP. Although he had a right to submit written matters for consideration by the commanding officer, Petitioner elected not to do so. Finally, Petitioner, a GySgt with 16 years of active service at the time of his NJP, accepted NJP and was found guilty based on the preponderance of the evidence presented at the NJP.

c. Denied right to hear victim(s) testimony. The right to confront one's accuser(s) in a *criminal prosecution* is

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ICO GUNNERY SERGEANT EI [REDACTED] ISMC

guaranteed in the Sixth Amendment to the U.S. Constitution. This right is wholly inapplicable to NJP proceedings that are by definition nonjudicial. NJP is a disciplinary measure used by commanders to maintain good order and discipline. Specifically, the rules of evidence do not apply at an Article 15 proceeding. Petitioner had the opportunity to review the written statements that formed the basis for his NJP offenses. Furthermore, when asked by his commanding officer whether he could explain the allegations raised against him, Petitioner responded, "Sir, I have no idea why they say these things." Thus Petitioner had an opportunity to address any bias, prejudice or motive to fabricate that may have existed. Petitioner's commanding officer was in the best position to determine the credibility of all witnesses and weigh the evidence for and against Petitioner. Petitioner had an opportunity to present evidence regarding the offense, to include evidence explaining and contradicting his actions. Obviously, the commanding officer did not accept Petitioner's version of the facts. As discussed above, Petitioner had the absolute right to refuse NJP and instead demand trial by courts-martial. Up until the point the commanding officer imposed punishment, Petitioner could have refused NJP. If he believed that the NJP proceeding was unfair because he was not permitted to confront his accusers then his proper recourse was to refuse NJP.

5. Conclusion. Accordingly, we recommend that the requested relief be denied.

[REDACTED]
Head, Military Law Branch
Judge Advocate Division

7. There exists no other agreement or understanding pertaining to this matter, either oral or written, between myself and the convening authority, or any other representative of the government, except those written and contained in this agreement

[Redacted signature]

219 02 2112

MC

[Redacted signature]

DEFENSE COUNSEL

[Redacted signature]

CORPS